*Saga Communications of New England, Inc. v. Voornas**

I. INTRODUCTION

Waiver of the right to pursue arbitration presents a paradox. Courts are loathe to allow parties to play "fast and loose"[1] by changing their positions in the proceeding according to the "exigencies of the moment."[2] Yet, there exists a strong federal[3] and state[4] policy in favor of arbitration. Generally, courts resolve doubts concerning the scope of arbitration in favor of arbitration.[5] This holds true regardless of whether the issue is the construction of the contract language itself or a defense to arbitrability, such as an allegation of waiver or delay.[6]

The Supreme Judicial Court of Maine recently addressed this paradox in *Saga Communications of New England, Inc. v. Voornas*.[7] While recognizing the strong policy in favor of arbitration, the court tipped the balance in favor of waiver in certain situations. At a minimum, the court held that where a party utilizes the judicial system to attempt to resolve the dispute, it could not

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* 756 A.2d 954 (Me. 2000).

[1] Selected Risks Ins. Co. v. Kobelinski, 421 F. Supp. 431, 434 (E.D. Pa. 1976).

[2] United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993).

[3] 9 U.S.C. § 10(a)–(b) (1994 & Supp. 2000) (creating a presumption of validity of arbitration awards).

[4] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) ("[T]hat a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision."); J.M. Huber Corp. v. Main-Erbauer, Inc., 493 A.2d 1048, 1050 (Me. 1985); Westbrook Sch. Comm. v. Westbrook Teachers Ass'n, 404 A.2d 204, 207–08 (Me. 1979); Council of Smaller Enter. v. Gates, McDonald & Co., 687 N.E.2d 1352, 1356 (Ohio 1998) (quoting AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986), which stated that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."); Summit Co. Bd. of Mental Retardation & Dev. Disabilities v. Am. Fed'n of State, County and Mun. Employees, 530 N.E.2d 962, 964 (Ohio Ct. App. 1988) (quoting *Misco*, 484 U.S. at 37–38, which stated that "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.").

[5] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 3–4 (1983).

[6] *Id.* at 24–25.

[7] Saga Communications of New England, Inc. v. Voornas, 756 A.2d 954 (Me. 2000).

escape the consequences of that decision by trying to enforce the arbitration provision.[8]

II. THE FACTS AND PROCEDURAL HISTORY OF THE CASE

In 1996, Lori Voornas signed a three-year contract of employment as an on-air radio announcer and co-host of the morning show broadcast by Saga's radio station WMGX in Portland, Maine.[9] Voornas declined to renew her contract when it came up for renewal in the summer of 1999, and she instead decided to leave her employment with Saga on August 31, 1999.[10] Voornas' departure triggered a noncompetition provision in her 1996 employment contract. The noncompetition provision precluded Voornas for a period of six months from performing services as an on-air announcer for any competing radio station,[11] either in format or targeted audience, in a 75-mile radius.[12]

Not long after her departure from Saga and well before the expiration of her noncompetition provision,[13] Voornas began employment with Citadel Communications Corporation (hereinafter Citadel).[14] Citadel owns several radio stations in Portland that compete with Saga and WMGX, some of which were listed in the noncompetition agreement.[15] Although Voornas did not immediately return to the air, she undertook general promotional activities for Citadel.[16]

In October of 1999, Saga learned about Voornas' employment with Citadel, and it commenced legal action against her.[17] In addition to filing its complaint, Saga moved the court for a temporary restraining order and preliminary injunction.[18] Although Saga initially sought injunctive relief for the alleged breach of the noncompetition agreement, it amended its complaint to add a second count alleging misappropriation of trade secrets.[19]

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[8] *Id.* at 962.

[9] *Id.* at 956.

[10] *Id.*

[11] The parties attached a list of competing stations to the 1996 employment contract, although the noncompetition agreement applied to any competing station whether it was listed or not. *Id.*

[12] *Id.*

[13] The noncompetition provision was due to expire on March 1, 2000. *Id.*

[14] *Id.*

[15] *Id.* at 956 n.2.

[16] *Id.* at 957.

[17] *Id.*

[18] *Id.*

[19] *Id.*

The day after Saga amended its complaint, Voornas moved the court to dismiss the claim and filed her opposition to Saga's motion for injunctive relief.[20] Pursuant to a hearing, the trial court—finding that Saga failed to show a likelihood of success on the merits and that it would be irreparably harmed absent an injunction—denied Saga's motion for injunctive relief.[21] Ten days after the hearing, Voornas moved for summary judgment.[22] Of critical importance, Saga answered Voornas' motion *on the merits*.[23] Saga also requested the trial court to grant summary judgment in its favor against Voornas.[24]

On December 20, 1999, Voornas appeared on-air for Citadel's station, WCLZ.[25] Saga immediately filed a motion for a temporary restraining order and preliminary injunction, which the court denied because Saga failed to show irreparable harm.[26] At this point, Saga demanded for the first time that Voornas voluntarily submit their dispute to arbitration in accordance with the noncompetition provision in the 1996 employment contract.[27]

Voornas refused to submit to voluntary arbitration, and Saga filed another expedited motion, seeking to stay the proceedings and compel arbitration pursuant to title 14, section 5928 of the Maine Revised Statutes.[28] The trial court denied Saga's motion, and Saga appealed from the order

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* Saga also filed a notice of deposition for Voornas, and the deposition was scheduled for December 27, 1999. *Id.*

[25] *Id.* WCLZ is now WPNT. The station was listed in Voornas' noncompetition agreement with Saga. *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* Section 5928 provides that court shall—on application of a party showing an agreement and the opposing party's refusal to arbitrate—"order the parties to proceed with arbitration." ME. REV. STAT. ANN. tit. 14, § 5928(1) (West 1994 & Supp. 2000). Section 5928 further provides as follows:

> Any action or proceeding involving an issue subject to arbitration shall be stayed, if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

ME. REV. STAT. ANN. tit. 14, § 5928(4) (West 1994 & Supp. 2000). If the opposing party denies the existence of the agreement to arbitrate, the court shall "proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied." *Saga*, 756 A.2d at 957.

denying its application to compel arbitration.[29] The Supreme Judicial Court of Maine held that Saga waived arbitration, and it affirmed the lower court's holding.[30]

III. A BRIEF HISTORY OF THE WAIVER DOCTRINE

An equitable principle, waiver is the "voluntary relinquishment or abandonment—express or implied—of a legal right or advantage."[31] It is axiomatic, perhaps, that a party may not take inconsistent positions within the same proceeding.[32] This is especially true where the party is acting with knowledge of its rights.[33]

A. *Waiver Generally*

Courts have repeatedly held that when a party has two remedies inconsistent with each other, any decisive act by the party determines its election of the chosen remedy.[34] In essence, a party waives its legal right when it unilaterally acts contra to that right.[35] The Supreme Court of Michigan best put it in 1875:

> A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.[36]

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[29] *Saga*, 756 A.2d at 957. Saga appealed pursuant to section 5945(1)(A), which provides that "[a]n appeal may be taken from: [a]n order denying an application to compel arbitration made under section 5928." ME. REV. STAT. ANN. tit. 14, § 5945(1)(A) (West 1994 & Supp. 2000).

[30] *Saga*, 756 A.2d at 961.

[31] BLACK'S LAW DICTIONARY 1574 (7th ed. 1999).

[32] Rob v. Vos, 155 U.S. 13 (1894).

[33] Equitable Trust Co. of New York v. Connecticut Brass & Mfg. Corp., 290 F. 712, 725 (2d Cir. 1923).

[34] *Id.* at 725 (holding that "when a party has two remedies inconsistent with each other, any decisive act by him, done with the knowledge of his rights and of the facts, determines once and for all his election of the remedy.").

[35] Coleman Production Credit Ass'n v. Mahan, 168 S.W.2d 903, 904 (Texas Civ. App. 1943) (addressing the unilateral attributes of waiver).

[36] Thompson v. Howard, 31 Mich. 309, 312 (1875).

B. *Waiver of Contractual Right to Pursue Arbitration*

There is nothing extraordinary about waiver of the right to pursue arbitration. Created in contract, the right to arbitration can be waived.[37] An equitable doctrine, waiver has been embedded in American jurisprudence for a long time.[38] In judicial proceedings, litigants waive their right to defenses of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process.[39] The arduous question, however, is who has the authority to hold that a party has waived its right to arbitration: the trial court or the arbitration panel?[40]

On the federal level, the United States Court of Appeals for the Second Circuit held in *Doctor's Ass'n, v. Distajo* (*Distajo I*), [41] that district courts have the power to decide the question of whether a party has waived its right to arbitration.[42] Further, courts have mostly confronted situations where a defendant who, deep into the litigation process, tries to stay the judicial

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[37] *See generally* 9 U.S.C. § 3 (1994 & Supp. 2000). Section 3 states as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration *under an agreement in writing* for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id. (emphasis added); *see* Cornell & Co. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C. Cir. 1966) (per curiam) ("[T]he right to arbitration, like any other contract right, can be waived. A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right.").

[38] *See supra* Part III.A.

[39] FED. R. CIV. P. 12(h)(1) ("A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion . . . or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.").

[40] After all, the court has the power to review the arbitration award once rendered, and if the court believes that the arbitration panel has exceeded its authority, it may vacate the award. Davidson v. Bucklew, 629 N.E.2d 456, 458 (Ohio Ct. App. 1992), *jurisdictional motion allowed*, 609 N.E.2d 172 (Ohio 1993), *appeal dismissed as improvidently allowed*, 626 N.E.2d 684 (Ohio 1994) (holding that a court will not interfere with arbitration proceedings even if the issue to be arbitrated is improper as any action taken by the arbitration panel would be reviewable by the common pleas court when either a vacation or confirmation is sought).

[41] Doctor's Ass'n v. Distajo (*Distajo I*), 66 F.3d 438 (2d Cir. 1995).

[42] *Id.* at 456.

proceedings under Section 3 of the Federal Arbitration Act (FAA).[43] The Second Circuit recognized that waiver is also applicable where the plaintiff tries to stay the judicial proceedings.[44]

In a sense, arbitrators do not have the authority to decide issues, which the parties did not submit to arbitration *under their agreement.*[45] Further, if arbitrators exceed their authority, the court is empowered to vacate their award.[46] The question arises, then whether the parties, *at time of contract formation*, intended the arbitrators to have the power to decide the issue of waiver.[47] However, it has long been accepted, at least in a collective bargaining situation, that an arbitrator has the "inherent power" to determine the sufficiency of the cause,[48] and derivatively waiver.

Generally, a party waives its right to pursue arbitration when it (1) engages in "protracted litigation"[49] that results in (2) prejudice to the opposing party.[50] For instance, the United States Court of Appeals for the Fourth Circuit held in *Radiator Specialty Co. v. Cannon Mills, Inc.*,[51] that a defendant waives their right to arbitrate by engaging in litigation at length.[52]

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[43] *Id.* at 455; 9 U.S.C. § 3 (1994 & Supp. 2000).

[44] *Distajo I*, 66 F.3d at 455; *Saga*, 756 A.2d at 961.

[45] State Farm Mut. Ins. v. Blevins, 551 N.E.2d 955, 957 (Ohio 1990).

[46] OHIO REV. CODE ANN. § 2711.10(D) (West 1994 & Supp. 2000).

[47] For instance, if the parties failed to empower the arbitration panel at the time of contract formation to decide the issue of prejudgment interest, it is left to the court to decide. Automated Tracking Sys. v. Great American Ins. Co., 719 N.E.2d 1036, 1042 (Ohio Ct. App. 1998) (reviewing with approval the trial court's deferral of a ruling on a motion for prejudgment interest until after it had ruled on an application to confirm an arbitration award). *But see* Luby v. Safeco Ins. Co., No. 52874, 1987 WL 19250, at *2 (Ohio Ct. App. Oct. 29, 1987) (holding that a party may not avail itself of the civil proceedings to confirm an arbitration award once its has been satisfied).

[48] Bd. of Trustees v. Fraternal Order of Police, 690 N.E.2d 1262, 1264 (Ohio 1988). The court quoted Arbitrator Burton B. Turkus as follows:

> In the absence of contract language expressly prohibiting the exercise of such power, the arbitrator by virtue of his authority and duty to fairly and finally settle and adjust (decide) the dispute before him, has the inherent power to determine the sufficiency of the cause and the reasonableness of the penalty imposed.

FAIRWEATHER'S PRACTICE & PROCEDURE IN LABOR ARBITRATION 327 (Ray J. Schoonhoven ed. 3d ed. 1991), *quoted in Bd. of Trustees*, 690 N.E.2d at 1264.

[49] Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991).

[50] *See* Cotton v. Slone, 4 F.3d 176, 179 (2d Cir. 1993) (citing *Kramer*, 943 F.2d 176, 179 (2d Cir. 1991)); *accord* Doctor's Ass'n v. Distajo (*Distajo II*), 107 F.3d 126, 131 (2d Cir. 1997).

[51] 97 F.2d 318 (4th Cir. 1938).

[52] *Id.* at 319.

IV. *SAGA'S* TREATMENT OF WAIVER

The Maine Supreme Judicial Court recognized the strong federal policy in favor of arbitration, but it concluded that the arbitration-friendly policy was "not intended to provide litigants with successive opportunities to prevail through continued revisitation of the same issue in different forums."[53] This is especially true, the court emphasized, when the party demanding arbitration is "running from an unfavorable result in the courts."[54]

A. *Power to Rule on Waiver: Trial Judges v. Arbitrators*

By holding that Saga waived its right to arbitration,[55] the Supreme Judicial Court of Maine seems to have adopted the Second Circuit's holding in *Distajo I*.[56] Although not explicitly holding so, the court seems to also have held that Maine's state courts now have the power to determine whether a party has waived its right to arbitration. Instead of simply deferring the matter to arbitration, and then reviewing the arbitration panel's final decision, Maine's state courts now have the power to stay arbitration proceedings on grounds of waiver.

B. *Prejudice*

The *Saga* court did not answer the question whether prejudice is necessary to determine waiver because it was "unable to agree with Saga that Voornas has not been prejudiced."[57] Further, the court did not allocate the burden of proof in the scenario that prejudice is necessary to determine waiver. Whereas the United States Court of Appeals for the Seventh Circuit holds that the commencement of the litigation process triggers a rebuttable

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[53] *Saga*, 756 A.2d at 962.

[54] *Id.*

[55] *Id.*

[56] *Distajo I*, 66 F.3d at 456.

[57] *Saga*, 956 A.2d at 961 ("[I]t is unnecessary in the present case to determine whether waiver could be found even absent prejudice as we are unable to agree with Saga that Voornas has not been prejudiced.").

presumption of waiver,[58] the majority of federal courts require a demonstration of prejudice as the sine qua non of waiver.[59]

Tacitly, the court adopted the Second Circuit's definition of prejudice, which is the "inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seek to arbitrate the same issue."[60] Further, the court emphasized that the "proper focus" in determining the existence of prejudice is on the "effect" of the delay upon the party opposing arbitration.[61]

V. RES JUDICATA, RES ARBITICATA, AND RES ARB-JUDICATA[62]

Saga purely dealt with the situation where the party itself waives its right to arbitration.[63] The question arises, however, whether the natural progression of *Saga* is the application of the entirety of the doctrine of *res judicata* to arbitration. *Res judicata* operates as a "complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them."[64] Privity in the context of *res judicata* is "somewhat amorphous"[65] and does not require either a contractual or a

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[58] Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390–91 (7th Cir. 1995) (holding that the commencement of the litigation process creates a rebuttable presumption of waiver of arbitration).

[59] Menorah Ins. Co. v. INX Reinsurance Corp., 72 F.3d 218, 221 (1st Cir. 1995); Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995); Morewitz v. West of England Ship Owners Mut. Protection & Immunity Ass'n, 62 F.3d 1356, 1366 (11th Cir. 1995); Hoffman Constr. Co. of Oregon v. Active Erectors & Installers, Inc., 969 F.2d 796, 798 (9th Cir. 1992); Fraser v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 817 F.2d 250, 252 (4th Cir. 1987); Lawrence v. Comprehensive Business Serv. Co., 833 F.2d 1159, 1164–65 (5th Cir. 1987).

[60] Doctor's Ass'n v. Distajo (*Distajo II*), 107 F.3d 126, 134 (2d Cir. 1997), *quoted in Saga*, 756 A.2d at 961.

[61] *Saga*, 756 A.2d at 961. The court concurred with the Eastern District of New York's holding in *American Express Fin. Advisors, Inc. v. Zito*, 45 F. Supp. 2d 230, 234 (E.D.N.Y. 1999) and *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 316 (1st Cir. 1997) (holding that a month delay is long and prejudicial in expedited cases). *Id.*

[62] *Res arbiticata* and *res arb-judicata* are terms created by the author of this recent development note. The author uses *res arbiticata* to denote the waiver of arbitration through a prior act in arbitration, and *res arb-judicata* to denote the waiver of arbitration through an act in court, like the situation in *Saga.*

[63] *Saga*, 756 A.2d at 954.

[64] Brown v. Dayton, 730 N.E.2d 958, 961 (Ohio 2000) (quoting Johnson's Island, Inc. v. Danbury Twp. Bd. of Trustees, 431 N.E.2d 672, 674 (Ohio 1982)).

[65] *Id.* at 962.

beneficiary relationship.[66] Instead, mutuality of interest, which includes the identity of the desired result, creates privity.[67]

The court has not yet answered the question of whether a party's right to pursue arbitration may be waived by those in privity with it. The aftermath of *Saga* is likely to deal with two questions: (1) whether a party's right to pursue arbitration can be waived through the prior acts of a party in privity in an arbitration (*res arbiticata*), and (2) whether it can be waived through the party in privity's act in court (*res arb-judicata*). The jury is still out on these questions. However, if history is any guide, it appears that courts will apply the entirety of the *res judicata* doctrine to arbitration.

VI. CONCLUSION

In the aftermath of *Saga*, a party may still seek an injunctive relief in appropriate circumstances without jeopardizing its right to arbitrate. However, if the litigation addresses substantive arbitrable issues, the party interested in arbitration should be careful and aware that it is walking a fine line that may waive its right to later pursue arbitration.

The more important aspect of *Saga* is the jurisdictional question. Courts have the power to review an arbitration award once rendered, and they can vacate an award in certain circumstances. Another approach for the Maine Supreme Judicial Court would have been to simply add waiver as one of the grounds for vacating an arbitration award. Instead, the court went further by tacitly empowering the state trial courts to stay arbitration proceedings on the grounds of waiver. In brief, litigants beware!

Majeed George Makhlouf

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[66] One may reasonably conclude that the Ohio Supreme Court's amorphous definition of privity in *Brown* only applies to privity between plaintiffs and not privity between defendants. In *Brown*, the plaintiffs challenged the validity of a city ordinance that was unsuccessfully challenged in a previous action. The court held that *res judicata* bars the new plaintiffs from relitigating the validity of the ordinance as the plaintiffs in both cases refer to themselves as "residents and taxpayers of the city of Dayton" and "their legal interests are the same." *Id.* at 962. However, the court did not explicitly restrict the extent of its holding to privity between plaintiffs. *Id.*

[67] *Id.*; *accord* Grava v. Parkman Twp., 653 N.E.2d 226, 229 (Ohio 1995) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 25 (1982) in holding that *res judicata* applies to "extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) [t]o present evidence or grounds or theories of the case not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action.").